No. 91-1496

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

IN RE: CAROLINA MOTOR EXPRESS, INC.,
Debtor

PETER C. REITER, *et al.*,
Petitioners,
v.
LANGDON M. COOPER, TRUSTEE FOR
CAROLINA MOTOR EXPRESS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a shipper utilizing the services of a motor common carrier may avoid or delay paying the carrier's filed tariff rate, as required by the Interstate Commerce Act, 49 U.S.C. § 10761, by raising the reasonableness of the filed rate as a defense to collection of that rate.

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BRIEF OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

Affiliates of the International Brotherhood of Teamsters (jointly referred to as "IBT") serve as the collective bargaining representatives for approximately 175,000 workers in the motor carrier industry. In this regard, the IBT negotiates and enters into agreements with motor carrier employers for wages, vacations, severance pay, and other employee benefits. In the event an employer breaches or fails to abide by its agreement, the IBT

may pursue the matter on behalf of the employees it represents.[1]

Following the adoption of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980), bankruptcies have plagued the trucking industry. In the past twelve years, 122 unionized carriers have declared bankruptcy. This has resulted in the loss of over 125,000 jobs for IBT members. In addition to losing their jobs, these IBT members are owed millions of dollars in unpaid wages and other benefits by the estates of these bankrupt carriers.

The IBT is not a creditor of Carolina Motor Express, the bankrupt carrier involved in the instant matter. However, in many, if not most, of the other motor carrier bankruptcies, the IBT and the pension funds to which the motor carriers were required to make payments under the IBT members' collective bargaining agreements are the largest unsecured creditors. Because of this creditor status, the IBT has an interest in seeing the estates of bankrupt motor carriers resolved expeditiously, with the trustees of those estates recovering as many lawful assets as possible. The resolution of the issues presented in this case likely will have a major impact upon the administration of other bankruptcy proceedings involving motor carriers and the ability of trustees to secure assets for the benefit of creditors. Accordingly, the IBT has a significant interest in this matter.

As set forth below, the IBT maintains that the decision by the Court of Appeals for Fourth Circuit correctly interpreted the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10101 *et seq.* (Supp. 1992), as mandating that all shippers must pay a motor carirer's filed tariff rate, and that defenses to the collection of a filed tariff rate

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

such as the alleged unreasonableness of the filed rate cannot be raised before the district court.

From a creditor's point of view, several problems would arise if the decision of the Court of Appeals were reversed and shippers could avoid paying a motor carrier's filed tariff rates pending a determination of rate reasonableness by the Interstate Commerce Commission ("ICC"). First, the distribution of assets by the bankruptcy estate, including the payment of wages and pension benefits owed to IBT members, would be delayed. The delay likely would be for an extended period of time, as evidenced by the fact that whereas approximately 200 rate reasonableness matters have been referred by the bankruptcy courts to the ICC, some dating back a year and more, the agency has failed to take action on any of these referred matters. Second, the bankruptcy estates are deprived of interest that could have been earned had those assets been collected in a timely manner. Finally, if the decision of the Court of Appeals is reversed, shippers could avoid their statutory obligation to pay the filed tariff rate merely by asserting a "rate reasonableness" defense, even if that defense has absolutely no merit. This would not only cause IBT members to incur significant injury, but it would be contrary to the basic intent and purpose of the ICA's filed rate doctrine.

For the foregoing reasons, the decision below should be affirmed.

SUMMARY OF ARGUMENT

1. The Interstate Commerce Act requires that a shipper pay a carrier's filed tariff rate without any defense or setoff. Pursuant to the Interstate Commerce Act and this Court's decision in *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S. Ct. 2759 (1990), if a shipper claims that a carrier's rate is unreasonable, that shipper may not delay payment of the filed rate by having the claim stayed pending referral to the ICC. Any claim that a tariff rate is unreasonable must be raised in a separate reparations proceeding.

2. The decision of the Court of Appeals for the Fourth Circuit below was consistent with the ICA, and the decisions of other circuits reaching a contrary result were limited to discrete factual situations and do not present a general rule consistent with all applications of the filed rate doctrine.

3. Although not required by the ICA, if a carrier is in bankruptcy, the equitable interest of shippers, the bankruptcy trustee, and creditors of the carrier can be accommodated by following the procedure adopted in *Delta Traffic Service, Inc. v. Georgia-Pacific Corp.*, 936 F.2d 64 (2d Cir. 1992). This procedure allows the filed rate to be paid by the shipper directly to the court (or alternatively to an escrow account maintained by the trustee of the bankruptcy estate), to be held pending a decision by the ICC on a reparations claim based on the alleged unreasonableness of the tariff rate at issue. If this decision is not made within a reasonable period of time, the filed rate is released from escrow to the bankruptcy trustee.

ARGUMENT

I. AN ALLEGATION THAT A CARRIER'S RATE IS UNREASONABLE SHOULD BE RESOLVED BY THE ICC IN THE CONTEXT OF A REPARATIONS ACTION

The issues raised in this appeal extend beyond the controversy between petitioners and respondents. The integrity and basic structure of ICA are at issue here. The Court should not ignore the clear provisions of the law because of an alleged inequity claimed by shippers. To do so would be contrary to the express intent of Congress. It also would not be equitable to creditors, like the IBT.

A. The Filed Rate Doctrine Does Not Permit A Shipper To Use The Defense Of Rate Reasonableness To Prevent Collection Of The Filed Rate

In most motor carrier bankruptcies, there are few assets in the hands of the carrier that can be used to pay debts owed to creditors. In marshalling the assets of the estate, the bankruptcy trustees will attempt to collect debts owed to the carrier, with the most prevalent form of debt owed being undercharges in freight payments. Such undercharges are the difference between the carrier's lawful tariff rate as filed with the ICC and the actual charges billed to and collected from the shipper. As this Court noted only two years ago, a carrier has a strict duty under the ICA to charge and collect the filed tariff rate, and a shipper is liable for any difference between an unfiled "negotiated rate" and the filed tariff rate. *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759 (1990).

In *Maislin*, this Court held that the defense of an unreasonable practice by a carrier in violation of 49 U.S.C. § 10701(a) could not be used by a shipper as a defense to bar collection of that carrier's filed rate. *Id.* at 2766-67. In *Cooper v. Delaware Valley Shippers (In re Carolina Motor Express, Inc.)*, 949 F.2d 107, 110 (4th Cir. 1991), *cert. granted sub nom. Reiter v. Cooper*, 112 S. Ct. 1934 (1992), the Fourth Circuit Court of Appeals held that the defense of an unreasonable rate by a carrier in violation of 49 U.S.C. § 10701(a) also could not be used by a shipper to bar collection of that carrier's filed rate. The Court of Appeals further held that a shipper is required to pay the filed tariff rate, and if it wished to contest the reasonableness of that rate, it must do so in an independent reparation action before the ICC.

The Fourth Circuit's holding clearly is correct. The ICA requires that a carrier "may not charge or receive a different compensation for . . . transportation or service than the rate specified in the tariff." 49 U.S.C.

§ 10761(a). Although the ICA also requires that the tariff rate be reasonable, 49 U.S.C. § 10701(a), nowhere in the ICA is a shipper given the right to make an offset against payment of the filed tariff rate.[2] Rather, if a shipper wishes to challenge the reasonableness of a tariff rate, it may do so by bringing a reparations action before the ICC. *See* 49 U.S.C. §§ 10708(a)(1), 11701(a), & 11705(a), (b)(1) & (b)(3); *see also Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986).

The requirement that a shipper pay the filed rate and pursue any allegation of rate unreasonableness in a separate reparations action is critical to the ICA's basic policy of preventing discrimination or preference. 49 U.S.C. §§ 10101(a)(1)(D) and 10741(b). As noted by this Court,

> The duty to file rates with the Commission . . . and the obligation to charge only those rates . . . have always been considered essential to preventing price discrimination and stabilizing rates.

Maislin, 110 S. Ct. at 2766 (citations omitted). Absent this requirement, shippers would be treated differently depending on whether any defenses were raised. A shipper

[2] The National Industrial Transportation League and others, as *amici curiae* for petitioners, argue that under a provision of the Bankruptcy Code, 11 U.S.C. § 553, an entity that is both a debtor and a creditor of the bankruptcy estate may offset any debts owed against monies owed to it by the bankrupt. *Brief of Amici* at 28-29. This provision is not applicable in the context of a reparations action, as it is uncertain whether a shipper will be legally entitled to any reparations, or what amount of reparations may be awarded. In order to apply the right of setoff in a bankruptcy matter, there must be definite and ascertainable debts existing between both the debtor and creditor. *In re Rozel Indus., Inc.*, 120 B.R. 944, 949 (Bankr. N.D. Ill. 1990) (§ 553 setoff requires definite liability to have accrued at time bankruptcy petition was filed); B. Weintraub & A. Resnick, *Bankruptcy Law Manual* ¶ 5.10[1] (3rd ed. 1992). The uncertain status of any reparations recovery thus eliminates a shipper's right of setoff under the Bankruptcy Code.

raising a defense of rate reasonableness, for example, could indefinitely delay paying the filed rate, thus having an advantage over those who either paid the filed rate or asserted no such defense. This preferential treatment of certain shippers is specifically prohibited by the ICA, which states that "[a] common carrier . . . may not charge or receive from a person a different compensation . . . for a service rendered, or to be rendered, in transportation the carrier may perform . . . than it charges or receives from another person for performing a like and contemporaneous service." 49 U.S.C. § 10741(a).

Indeed, the issue of whether rate reasonableness must be raised as a defense to an undercharge claim or in a separate reparations action was resolved by *Maislin*. There, this Court held that the use of a defense, including any equitable defense, could not bar the collection of a filed rate. In overturning the ICC's policy in *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C. 2d 623 (1989), the Court thus specifically rejected the ICC's allowance of equitable defenses and noted that "equities" are not relevant to the application of the filed rate requirement of 49 U.S.C. § 10761. *Maislin*, 110 S.Ct. at 2769.[3] Accordingly, peti-

[3] Prior to the *Maislin* decision, several Circuit Courts of Appeal disagreed on whether the ICC's *Negotiated Rates* policy was consistent with ICA. Part of that policy included the use of equitable defenses to collection of a carrier's filed rate. *Maislin*, 110 S. Ct. at 2765, n.8. This Court specifically cited to *Supreme Beef Processors, Inc. v. Yaquinto (In re Caravan Refrigerated Cargo, Inc.)*, 864 F.2d 388 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 3254 (1990), on one hand, and *Delta Traffic Serv., Inc. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990), *Orscheln Bros. Truck Lines v. Zenith Electric Corp.*, 899 F.2d 642 (7th Cir. 1990), *vacated*, 111 S. Ct. 334 (1990), and *West Coast Truck Lines, Inc. v. Weyerhauser Co.*, 893 F.2d 1016 (9th Cir. 1990), *vacated*, 912 F.2d 1130 (9th Cir. 1990), on the other hand, as part of the disagreement between the circuits on the issue of whether a carrier's "unreasonable practices" could be used as a defense to the collection of a carrier's filed rate. As this Court in *Maislin* upheld the Fifth Circuit's reasoning in *Supreme Beef*,

tioner's equitable arguments that the bankruptcy status of a carrier requires a court to ignore strict application to collection of the filed rate are irrelevant.

Although *Maislin* prohibited a shipper from raising equitable defenses to a filed rate claim, a shipper's right to challenge the reasonableness of a tariff rate was not eliminated. Rather, by citing with approval to *Arizona Grocery Co. v. Atchison, T. & S.F.R.*, 284 U.S. 370 (1932), this Court recognized that a shipper could raise that issue in a separate reparations proceeding: "the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation."[4] *Maislin*, 110 S.Ct. at 2767 (quoting *Arizona Grocery*, 284 U.S. at 384-85).

B. The Authority Cited By Petitioners Does Not Require Payment Of A Carrier's Filed Rate To Be Delayed Through Referral To The ICC

Petitioners and their supporting *amici* base their legal argument on two points. First, they claim that the Fourth Circuit's holding was in conflict with the decision of other circuits, and that the other circuits have created a general rule requiring referral to the ICC anytime a rate reasonableness defense is asserted. Second, they claim that a decision of this Court, *United States v. Western Pacific R. Co.*, 357 U.S. 59 (1956), mandates referral of such defenses to the ICC. An analysis of the authority cited by petitioners and their supporting *amici* shows that such arguments are in error. In fact, the authority cited mandates the opposite result.

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that decision thus takes precedence over the other decisions, which were effectively overruled by *Maislin*.

[4] Since the time of the *Arizona Grocery* decision, the ICA has been amended specifically to set forth a procedure under which reparations can be recovered. 49 U.S.C. § 10708(f).

The conflict that petitioners claim to exist between the Fourth Circuit, *Cooper v. Delaware Valley Shippers (In re Carolina Motor Express, Inc.)*, 949 F.2d 107 (4th Cir. 1991), and the Fifth Circuit, *Supreme Beef Processors, Inc. v. Yaquinto (In re Cavaran Refrigerated Cargo, Inc.)*, 864 F.2d 308 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 3254 (1990) ("*Supreme Beef*"), on one hand, and the Eighth Circuit, *Atlantis Express, Inc. v. Standard Transportation Services, Inc.*, 955 F.2d 529 (8th Cir. 1992), and the Second Circuit, *Duffy v. BMC Industries, Inc.*, 938 F.2d 353 (2nd Cir. 1991), on the other hand, is grossly overstated.[5] A review of these and other cases shows that courts that have considered the issue herein presented have recognized, as did the Fourth Circuit, that the filed rate doctrine requires a shipper to pay the filed tariff rate and any issues of rate reasonableness may be raised only in a separate reparations action before the ICC. The decisions of other circuits cited by petitioners have not ruled on the specific issue before the Court,

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[5] Petitioners also cite to several other decisions as part of this "split," none of which should be relied upon as persuasive authority. First, petitioners cite to an unpublished opinion of the Sixth Circuit, *Rebel Motor Freight, Inc. v. ICC*, 933 F.2d 1009 (table) (6th Cir. 1991), *cert. denied*, 112 S. Ct. 617 (1991). Because it is unpublished, *Rebel* cannot be cited with any authority. 6th Cir. R. 10(f). Even in *Rebel*, however, the Sixth Circuit stated that it did not "interpret *Maislin* to require a re-referral to the ICC in every suit by a carrier to collect undercharges. . . . Requiring a ruling from the ICC on reasonableness in every case would weaken the 'strict adherence' to the filed rate doctrine required by *Maislin*." No. 89-3886, 1991 U.S. App. LEXIS 11780, *8 (6th Cir. filed May 28, 1991). Second, petitioners cite to *Delta Traffic Serv., Inc. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990), *Orscheln Bros. Truck Lines v. Zenith Electric Corp.*, 899 F.2d 642 (7th Cir. 1990), *vacated*, 111 S. Ct. 334 (1990), and *West Coast Truck Lines, Inc. v. Weyerhauser Co.*, 893 F.2d 1016 (9th Cir. 1990), *vacated*, 912 F.2d 1130 (9th Cir. 1990), as requiring referral to the ICC. Each of these decisions was either modified or overruled by this Court's decision in *Maislin*. See n. 3 *supra*. Third, petitioners rely upon *Orr v. ICC*, 912 F.2d 119 (6th Cir. 1990), which simply did not address the issue of whether referral to the ICC is required.

but rather have limited their holdings to discrete factual situations and thus do not present a general rule applicable to all motor carrier bankruptcies.

In *Duffy v. BMC Industries, Inc.*, 938 F.2d 353, 354 (2d Cir. 1991), which is cited by petitioners as authority for allowing a shipper to avoid paying the filed tariff rate, the Second Circuit expressly reserved decision on the issue "of whether in all circumstances a shipper's administrative challenge to the reasonableness of a rate must await payment." Stating that the outstanding decisions left it "somewhat uncertain as to whether an unreasonable rate defense may generally be asserted by a private shipper prior to full payment," 938 F.2d at 357, the court in *Duffy* limited its holding to a situation in which a shipper was unable to raise rate reasonableness as a defense before the ICC because the statute of limitations for a reparations action had expired. In that specific situation, the court concluded that the shipper could raise reasonableness as a defense before the district court.[6]

Similarly, in *Atlantis Express, Inc. v. Standard Transportation Services, Inc.*, 955 F.2d 529, 536 (8th Cir. 1992), the Eighth Circuit Court of Appeals also reserved ruling on whether reasonableness was a defense in all undercharge cases; there, the court limited its holding allowing the use of rate reasonableness as a defense only when reparations no longer was a valid remedy for the shipper.

Petitioners also claim that the Fourth Circuit is the only court not to have required payment of the filed rate to be stayed when a rate reasonableness claim is raised. However, two decisions by the Fifth Circuit have addressed the issue of whether a stay was proper in the

[6] The use of *Duffy* as authority for the proposition that payment of the filed tariff rate could be avoided by referral of a rate reasonableness claim to the ICC, as argued by petitioners, was specifically rejected in *Lifschultz Fast Freight, Inc. v. Rainbow Shops, Inc.*, 784 F. Supp. 89, 92-93 (S.D.N.Y. 1992).

same manner as did the Fourth Circuit.[7] In *Southern Pacific Transportation Co. v. San Antonio*, 748 F.2d 266 (5th Cir. 1984), the court held that allowing payment only of the undercharge and not the full tariff rate pending referral to the ICC would "freeze" the rate at a level below the tariff rate, thereby allowing a federal court to unlawfully order that a rate other than the filed rate be paid. The court noted that:

> [t]he Interstate Commerce Act . . . entails a balanced and coherent system for the payment and review of rates. The shipper is required to pay the filed rate at the time of shipment but may later seek review and reparations in the I.C.C.

Id. at 274.[8] A similar result was reached in *Supreme Beef*, where the court held:

> A shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed rate doctrine or force the district court to stay proceedings and refer the case to the Commission. Any other decision would constitute legislation on our part; it would create an exception that swallows the doctrine and

[7] There now appears to be an internal split within the Fifth Circuit on this issue. *Supreme Beef* and *Southern Pac. Transp. Co. v. San Antonio*, required payment of the entire filed rate, with any unreasonable rate allegation to be handled in a separate reparations action, while the unpublished decision in *Advance United Expressways, Inc. v. Eastman Kodak Co.*, No. 91-1320 (5th Cir. June 26, 1992), allowed the shipper to delay payment of the filed rate through raising rate reasonableness as a defense to the claim. However, as the Fifth Circuit in *Advance United* did not distinguish (or even discuss) *Southern Pac. Transp. Co. v. San Antonio*, and summarily concluded that *Supreme Beef* is "impractical," the viability of *Advance United* is questionable, particularly as that decision has been appealed to the Fifth Circuit *en banc*.

[8] The Fifth Circuit noted that the ICC, an intervenor in that case, agreed with the court's conclusion that the primary jurisdiction of the agency "would not be impaired by immediate execution of the judgment," thus requiring immediate payment of the filed rate. 748 F.2d at 273, n.14.

> thereby would vitiate a long-standing and notorious policy which Congress has visited and left intact.

864 F.2d at 392 (footnote omitted).[9]

Both the Fourth and Fifth Circuits also noted the problem that is created for the IBT and other creditors if referral to the ICC is permitted—infinite delay in payment of the filed rate. As noted by the Fifth Circuit, a delay in payment of the tariff rate interferes with the filed rate doctrine, and a stay "only threatens to add further, indefinite delays as the plaintiffs await a series of decisions by the I.C.C. 'Whenever' becomes 'never.'" *Southern Pac. Transp. Co. v. San Antonio*, 748 F.2d at 274 (footnote omitted). The court's admonition was indeed prescient. As noted above, notwithstanding the referral of some 200 rate reasonableness matters to the ICC in the past two years, not one has been acted upon.

As a second proposition, petitioners contend that this Court's decision in *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956), requires a court to stay all proceedings and allow the ICC to rule upon any rate reasonableness defense before a shipper is required to pay a carrier's filed tariff rate. This argument, however, fails to acknowledge the factual and statutory differences between *Western Pacific* and the case now before the Court.

In *Western Pacific*, three railroads were seeking to recover charges from the federal government for carrying bomb cases filled with napalm gel. The government paid the original freight bills, but upon audit, determined that the wrong tariff rate was applied, and unilaterally de-

[9] This Court has often recognized that a court cannot enjoin a carrier from collecting its filed rates. Unless a rate is suspended by the ICC, a carrier is entitled, and indeed is mandated, to collect its filed rate. A shipper may recover damages if the collected rate is subsequently found unlawful. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 697 (1973); *see also In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978).

ducted the alleged overcharges from subsequent shipments. The railroads then brought actions to recover the amounts deducted by the government. In contending that the government's actions were improper, the railroads argued that the government could always file a reparations action with the ICC to recover any unreasonable rates paid. This argument was rejected by the Court, holding that under the provisions of 49 U.S.C. § 66,[10] "Congress has relieved the Government from filing such reparations suits by expressly authorizing the General Accounting Office to deduct overpayments from subsequent bills of the carrier." 352 U.S. at 73-74.

Thus, *Western Pacific* does not require a court that is presented with an undercharge claim by the estate of a motor carrier to stay its proceedings and refer issues of rate reasonableness to the ICC, but rather deals with a statute applicable solely to the federal government. This distinctive factual situation is not present here, and any reliance by petitioners upon *Western Pacific* as a basis for avoidance of payment of the filed rate is misplaced.

C. The Avoidance Of Paying The Filed Rate As Urged By Petitioners Will Cause Significant Problems In The Administration Of Bankruptcy Estates

While delay by a shipper in paying the filed rate will always create problems for carriers, particular problems arise in the context of a bankruptcy proceeding. First, aside from the ICA's mandate, the normal commercial incentives for a shipper to promptly pay the filed rate do not exist. If a carrier was still in operation, a shipper likely would seek a quick and reasonable settlement in order to maintain its business relationship with a carrier. If a carrier has declared bankruptcy, as noted by the Fourth Circuit, if referral to the ICC is mandated, the availability of rate reasonableness as a defense "would

[10] This statute is now amended and codified at 31 U.S.C. 3726(b).

provide a strong incentive for shippers routinely to contest the validity of the carrier's filed rate." *Cooper*, 949 F.2d at 110. This incentive exists even if the rate reasonableness defense has no merit.[11]

Furthermore, numerous bankruptcy estates must continue to be administered at a continuing cost to creditors and the wages and pension benefits owed to IBT members remain unpaid while a claim has been referred to the ICC. Because of the continuous delay by the ICC in determining any rate reasonableness referrals, many bankruptcy estates continue to remain open, and creditors of the estates are delayed in being paid.

A stay of collection also would frustrate well-established policies of the bankruptcy laws. Requiring a bankruptcy trustee to forego collection of undercharges while the ICC determines the reasonableness of the rate would unduly delay the trustee's ability to marshal the assets of the estate for distribution to creditors. Bankruptcy law has established a duty on the part of the trustee to maximize the value of the estate for creditors. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985); *In re Rigden*, 795 F.2d 727, 730 (9th Cir. 1986); *In re Johnson*, 55 B.R. 800, 802 (Bankr. E.D. Va. 1985). Trustees thus are obligated to pursue vigorously freight undercharge claims as estate assets available to creditors.

Integral to this duty to maximize the value of the estate is a duty to convert estate assets to cash in an expeditious manner for distribution to creditors. *See, e.g., Rife v. Ruble*, 107 F.2d 84, 86 (6th Cir. 1939); *In re Bell & Beckwith*, 77 B.R. 606, 614 (Bankr. N.D. Ohio 1987), *aff'd*, 87 B.R. 472 (N.D. Ohio 1987); *In re Ferkhauf, Inc.*, 42 B.R. 852, 860 (Bankr. S.D.N.Y. 1984), *aff'd*, 56 B.R. 774 (S.D.N.Y. 1985). *See also Bittner v. Borne Chemical Co.*, 691 F.2d 134, 136-37 (3rd Cir. 1982) (quoting legislative history of the Bankruptcy Code stating that "'the importance of speed and efficiency to creditors and debtors'" in a bankruptcy reorganization "'cannot be overemphasized'"). Indeed, a Chapter 7 trustee's fiduciary duty to "collect and reduce to money" estate property and close the estate "expeditiously" is expressly set forth in the Bankruptcy Code. *See* 11 U.S.C. § 704(1).

[11] The Fourth Circuit also noted that shippers "did not contest [the reasonableness of the filed rate] until they were sued by the trustee." *Cooper*, 949 F.2d at 110. There simply is no excuse for a shipper to wait until it is sued for the filed rate to contest the reasonableness of that rate, as it is uncontested that shippers are charged with knowledge of the filed rate. *Maislin*, 110 S. Ct. at 2766, n.9; *Louisville & N.R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915).

Cases referred to the ICC for rate reasonableness determinations remain stalled there unresolved. If permitted to avoid payment to the estate pending these determinations, shippers would frustrate recoveries by creditors in contravention of well-settled policies of bankruptcy law. Timely collection thus serves important bankruptcy principles.

II. THE ALLEGED INEQUITY OF REQUIRING A SHIPPER TO PAY THE FILED RATE IN A BANKRUPTCY SITUATION CAN BE HANDLED BY REQUIRING THE MONIES TO BE HELD IN ESCROW BY THE COURT OR THE TRUSTEE

For the reasons set forth above, the position advanced by the petitioners has no merit as a matter of law. Instead, the arguments for not enforcing the filed rate doctrine when the undercharge claim is made by a trustee of a bankrupt carrier are solely predicated upon equitable concerns. In particular, it is alleged that because a reparations action against a bankrupt carrier, even if successful, may not result in any recovery, requiring a shipper to pay the filed rate in such circumstances may as a practical matter deprive it of the ability to pursue a rate reasonableness action against the carrier. If this perceived inequity were not present, petitioners implic-

itly concede that a separate reparations action would not be improper.

It first is important to note that no showing has been made by petitioners that, in all bankruptcy matters, assets will be unavailable to pay a reparations order. In fact, such assets may be available, particularly if there is a successful Chapter 11 reorganization. Without any evidence to support their position, the alleged inequities claimed by petitioners and their *amici* cannot be properly considered.

In any event, as discussed above, such equitable arguments against application of the filed rate doctrine already have been considered and rejected by this Court in *Maislin*. Whether a shipper could recover reparations awarded by the ICC should not relieve it of its legal obligation to pay the filed rate. Nonetheless, to the extent a court perceives a need "to protect" the interests of a shipper when it appears a carrier would be unlikely to fully satisfy any reparations order if its rates were found to be unreasonable, that need can be accommodated without abrogating the ICA's requirement that carriers collect and shippers pay the filed tariff rate. Indeed, this accommodation already has been applied by the Second Circuit in *Delta Traffic Service, Inc. v. Georgia-Pacific Corp.*, 936 F.2d 64 (2d Cir. 1992).

In *Delta Traffic Service, Inc. v. Georgia-Pacific*, the court ordered the shipper to pay the filed rate, but because the carrier was in bankruptcy, also ordered the district court to hold such payment pending a determination of rate reasonableness by the ICC. This procedure protected the ability of the shipper to recover all or part of its payment in the event its rate reasonableness arguments prevailed. To protect the interests of creditors, however, the court also noted that if the ICC did not resolve the issue of rate reasonableness within a reasonable time, the trustee could petition the district court to release the money. Under this approach, it

would appear that both sides would have an interest in resolving the matter quickly. While certainly not mandated by the ICA, this procedure would address the concerns of all interested parties.[12]

Further, this procedure is consistent with the typical conduct of a bankruptcy case, as bankruptcy courts frequently order the payment of funds into an escrow account where there are disputes among creditors or between creditors and the debtor regarding the disposition of funds. *See, e.g., In re Miranne*, 87 B.R. 897, 903 (E.D. La. 1988) (funds deposited into Bankruptcy Court registry due to competing claims of creditors), *aff'd sub nom. Miranne v. First Fin. Bank*, 861 F.2d 1278 (5th Cir. 1988); *In re Conroe Forge & Mfg. Corp.*, 82 B.R. 781 (Bankr. W.D. Pa. 1988) (proceeds of sale placed in escrow pending resolution of dispute over disposition). Rather than having the monies deposited with the court, the IBT submits that it would be preferable for the monies to be held in escrow by the trustee. This would eliminate any burden upon the court and also would likely enable the trustee to earn interest on the escrow funds which could be used for the benefit of the estate and its creditors.

With this minor modification, the Court should approve the procedure used in *Delta Traffic Service v. Georgia-Pacific* as a means of enabling a lower court to fashion an appropriate equitable procedure when deemed necessary. However, it should be cautioned that this accommodation is not a "cure-all" for every undercharge dispute,

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[12] It is interesting to note that petitioners and their supporting *amici* do not acknowledge that the decision in *Delta Traffic Serv., Inc. v. Georgia-Pacific Corp.* addresses in any way the equitable concerns of the interested parties. By failing to acknowledge the existence of this available remedy, it becomes clear that petitioners wish to avoid paying any money at all, even if their interests are adequately protected by a procedure in which funds are paid into escrow.

but should be applied only in those cases where a shipper makes a *prima facie* showing that a carrier's rate is unreasonable *and* that a carrier would be unable to fully satisfy a reparations order issued in such a proceeding. If both of these factors are not present, the filed rate must be paid in full directly to the bankruptcy estate and no monies should be placed in escrow.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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